Office-Supreme Court, U.S.
FILED
SEP 1 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1935

IN THE

Supreme Court of the United States

October Term, 1982

DEMYAN'S HOFBRAU, INC.,

Petitioner,

vs.

INA UNDERWRITERS INSURANCE CO.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF ON BEHALF OF PETITIONER PURSUANT TO §22.06 OF THE RULES OF THE COURT

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ADDITIONAL QUESTION PRESENTED*

1. Does the fact that a District Court Judge sitting without a jury in a diversity civil arson case found arson using a standard of a required degree of persuasion lesser than and contrary to that required under State law constitute a clearly erroneous ruling depriving the prejudiced party of due process and requiring a reversal?

*We believe that this question was covered within the parameters of the original questions presented. But so that there be no question, it is re-presented at this time.

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STATUTES

Rule 22.6 of the Rules of the Supreme Court of the United States 1

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PRELIMINARY STATEMENT

This brief is respectfully submitted to supplement the petition for certiorari of the petitioner herein. It is submitted in accordance with Rule 22.6 of the Rules of this Court prior to a determination on the petition and addresses a new case by the second highest appellate court in the State of New York that was not previously available but directly affects the matter before the Court.

ARGUMENT

POINT I

THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK HAS FOUND THAT THE DECISION OF THE DISTRICT COURT AS TO THE STANDARD OF EVIDENCE APPLIED ON THE QUESTION OF ARSON REFLECTED AN ERRONEOUS VIEW OF THE LAW OF THE STATE OF NEW YORK.

On August 15, 1983, the Appellate Division [Second Department] of the Supreme Court of the State of New York, in *Hutt v. Lumbermens Mutual Casualty Company* (N.Y. 1983) __ A.D.2d __, __ N.Y.S.2d __ (not yet reported in the New York Official Reports or in the New York Supplement), NEW YORK LAW JOURNAL, August 24, 1983, p. 1, col. 6, and continued at page 3, columns 1 and 2, found the law in New York to be that arson in a civil case must be proven by a measure of persuasion of clear and convincing evidence. Further, the Court stated that the inference of arson must be "strong and almost inevitable."

In the footnotes to its unanimous opinion, the Court states with reference to the cause presently before this Court:

> "To the extent that Demyan's Hofbrau v. INA Underwriters Ins. Co. (542 F. Supp. 1385) which relied on Johnson v. Agricultural Ins. Co. (25 Hun. 251) is to the contrary, we need simply say that it reflects an erroneous view of the law of this State and, therefore, we decline to follow it."

Interestingly, the Court also states in a footnote:

> "A caveat is indicated. While, as discussed, we believe that, under New York law, the clear and convincing evidence standard relates to the quality rather than the quantity of the evidence presented, we recognize that the United States Supreme Court, in certain areas, has held as a matter of due process, that the standard requires a more exacting measure of persuasion—less than that of beyond a reasonable doubt imposed in criminal causes but more than the traditional preponderance (e.g., Santofsky v. Kramer, 455 U.S. 745, 764). Our holding today should not be read as reducing a measure of persuasion which may be constitutionally mandated in such cases."

We respectfully submit that the courts below, having viewed the evidence as presented under the wrong view of the laws of New York as respects the burden of proof in arson cases, the plaintiff has been denied its rights to due process. Since especially under the clear and convincing evidence standard the findings of the court below are not supported by the weight of the evidence, such findings are clearly erroneous.

CONCLUSION

BASED ON THE FOREGOING AND THE ORIGINAL PETITION FOR A WRIT OF CERTIORARI, PETITIONER RESPECTFULLY PRAYS THAT THIS COURT GRANT A WRIT OF CERTIORARI TO CONSIDER THE IMPORTANT QUESTIONS PRESENTED AND TO RECTIFY AN OBVIOUS ERROR.

Respectfully submitted,

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APPENDIX 1
OPINION IN *HUTT v. LUMBERMANS MUTUAL CASUALTY CO.*

ALAN S. HUTT, et al., appellants, v. LUMBERMENS MUTUAL CASUALTY COMPANY, respondent, et al., defendant.

Decided August 15, 1983

Before *Titone, J.P.; Lazer, Gibbons* and *Thompson, JJ.*

Appeal from a judgment of the Supreme Court at Trial Term (*George F.X. McInerney, J.*), entered October 19, 1981 in Suffolk County, which is in favor of the defendant-insurer, upon a jury verdict in said defendant's favor.

Scher & Eliasberg, P.C., Great Neck, N.Y. (Robert A. Scher of counsel), for appellants.

Whitman & Ransom, New York, N.Y. (Patrick Lanigan of counsel; Robert S. Newman on the brief), for respondent.

Titone, J.P.—In an action to recover the proceeds of a fire insurance policy, the plaintiffs appeal from a judgment of the Supreme Court, Suffolk County, which dismissed the complaint following a jury verdict in favor of the defendant-insurer (hereinafter defendant).

The issue is whether the defendant met its burden of establishing the affirmative defense of arson. Finding that it did not, we reverse.

Plaintiffs were the owners of a one-family house, in Deer Park, L.I., in which they had resided for some twenty-one years. The house was insured under a standard homeowner's policy issued by defendant which provided protection against damage caused by fire. Sometime during the early morning hours of Feb. 21, 1980, while the plaintiffs were home, a fire destroyed the house and its contents. Defendant disclaimed coverage, claiming arson. This action followed.

To support its arson defense, defendant produced a single expert whose conclusion that the fire was incendiary in nature was based upon the premise that certain wall-burn patterns (described as "V patterns") were inconsistent with any hypothesis but arson, and that certain floor-burn patterns (called "pour patterns") suggested the use of an accelerant.

The expert's analysis of the wall-burn patterns hinged on the theory that no sparks had been carried from the point of the initial conflagration to ignite secondary fires throughout the house. This was based on the assumption that heat had broken the exterior den windows and vented the fire. But, on cross-examination, the expert conceded that he did not know when the windows had been broken and that it was equally possible that they might have been broken by the fire department after the fire had already engulfed the area. If that had been the case, it was possible that sparks, carried by smoke and flame, might have swept through the house causing secondary ignitions on the first and second floors, which would have been consistent with the manner and direction that the fire had spread.

Similar equivocation is involved with respect to the floor-burn patterns. The expert examined floor burns in the living room, bathroom and den and formed an initial opinion that they were produced by an accelerant. Yet, on cross-examination he qualified this opinion after noting that if an accelerant had been used the carpet would have burned through and had not, that innocuous chemicals may have been responsible for the bathroom pattern, and that an "instant-on" television (the type that plaintiffs owned) or burning debris that had fallen would also have been consistent with the downward burn patterns in the den. These possibilities were never considered during the course of the expert's investigation.

In an action to recover the proceeds of a fire insurance policy, it is the insurer's burden to establish the affirmative defense of arson (see 2 NY PJI 4:80, p. 1066). And, notwithstanding some early New York cases suggesting that the burden is met by a mere preponderance standard of proof (e.g., *Johnson v. Agricultural Ins. Co.*, 25 Hun 251),[1] we think that, because arson is "but one form of fraud in making [a] claim under a policy" (2 NY PJI 1066) and an inference of arson must be "strong and almost in-

(1) The rule set forth in Johnson was noted by the Court of Appeals to be the subject of much criticism and has never been directly passed upon by that court (Seybolt v. New York, Lake Erie & Western R.R. Co., 95 NY 562, 569). Moreover, it would appear that the Johnson court's real concern was with limiting the reasonable doubt standard to criminal cases (see Kurz v. Doerr, 180 NY 88, 92; compare, Groom, Proof of Crime in a Civil Proceeding, 13 Minn L Rev 556, with Cohen, Allegation of Crime in a Civil Action: Burden of Proof, 20 U Toronto Fac L Rev 20, 24). We would also note that, aside from a recent Federal District Court opinion (Demyan's Hofbrau v. INA Underwriters Ins. Co., 542 F Supp 1385, 1386), Johnson has not been cited by a New York State court for more than half a century.

evitable" (Appleman, Insurance Law and Practice, Section 12229), the more contemporary measure of persuasion is that of clear and convincing evidence (*Simcuski v. Saeli*, 44 NY 2d 442, 452; *Rudman v. Cowles Communications*, 30 NY 2d 1, 10; see, e.g., *Saks & Co. v. Continental Ins. Co.*, 26 AD 2d 540, affd 23 NY 2d 161; *C-Suzanne Beauty Salon v. General Ins. Co. of Amer.*, 574 F.2d 106, 112, n 9; cr. *Jonari Mgt. Corp. v. St. Paul Fire & Mar. Ins. Co.*, 58 NY 2d 408, 417).

As was so well noted in *Ziegler v. Hustisford Farmers Mut. Co.* (238 Wisc 238, 298 NW 610, 612), " 'To fasten upon a man the act of wilfully and maliciously setting fire to his own building should certainly require more evidence than to establish the fact of payment of a note, or the truth of an account in setoff; because the improbability or presumption to be overcome in the one case is much stronger than it is in the other. Hence, it can never be improper to call the attention of the jury to the character of the issue, and to remind them that more evidence should be required to establish trifling or indifferent ones' " (quoting 2 Jones, Commentaries on Evidence [2d ed], Section 563, p. 1036).[2]

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(2) We are cognizant that out-of-state authorities have divided on the question (see cases collected in Godwin v. Farmers Ins. Co. of Amer., 129 Ariz 416, 631 P 2d 571, 574; Great Amer. Ins. Co. v. K&W Log, Inc., 22 Wash App 468, 591 P 2d 457, 459; 46 CJS, Insurance, Section 1359, pp 567-568). We find those cases applying the clear and convincing standard (e.g., Carpenter v. Union Ins. Soc., 284 F. 2d 155, 162; Jonas v. Northeastern Mut. Fire Ins. Co., 44 Wisc 2d 347, 171 NW 2d 185, 187, n 1) to be more in accord with New York law which has long imposed a "far more demanding" burden when a serious accusation involving moral turpitude, such as fraud, is leveled (Jo Ann Homes at Bellmore v. Dworetz, 25 NY 2d 112, 121; see Commissioner of Public Welfare

It must be emphasized, however, that the clear and convincing standard relates only to the quality and note the quantum of proof (see Lilly, Introduction to the Law of Evidence, Section 15, p. 42; 4 Benders' NY Evid, Section 183.03). "Proof may be required to be clear and convincing without transcending the rule of preponderance" (*Roberage v. Booner*, 185 NY 265, 268).[3] Thus, in cases where the standard is applicable, the proper jury "instruct[ion] [is] that to make out a preponderance, the evidence should be clear and convincing" (*McKeon v. Van Slyck*, 223 NY 392, 397; see also, McBaine, Burden of Proof: Degrees of Belief, 32

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of City of N.Y. v. Ryan, 238 App Div 607; Ajax Hardware Mfg. Corp. v. Industrial Plants Corp., 569 F. 2d 181, 186; Maguire, Weinstein, and Mansfield, Cases and Materials on Evidence [6th ed], p. 1035; McCormick, Evidence [2d ed], Section 340, pp. 796-798). Moreover, the conflicting cases fail to recognize that, as we point out in the text, a clear and convincing standard relates to the quality rather than the quantum of proof (see, e.g., Godwin v. Farmers Ins. Co. of Amer., supra; Werner's Furniture v. Commercial Union Ins. Co., 39 Ill App 3d 59; Great Amer. Ins. Co. v. K&W Log, Inc., supra). To the extent that Demyan's Hofbrau v. INA Underwriters Ins. Co. (542 F. Supp. 1385), which relied on Johnson v. Agricultural Ins. Co. (25 Hun 251), is to the contrary, we need simply say that it reflects an erroneous view of the law of this State and, therefore, we decline to follow it.

(3) A caveat is indicated. While, as discussed, we believe that, under New York law, the clear and convincing evidence standard relates to the quality rather than the quantity of the evidence presented, we recognize that the United States Supreme Court, in certain areas, has held as a matter of due process, that the standard requires a more exacting measure of persuasion—less than that of beyond a reasonable doubt imposed in criminal causes but more than the traditional preponderance (e.g., Santosky v. Kramer, 455 US 745, 764). Our holding today should not be read as reducing a measure of persuasion which may be constitutionally mandated in such cases.

Calif L Rev 242, 246, 253-254).[4]

In this case, the evidence is equally balanced. Neither qualitatively nor quantitatively does it meet the required level of convincement. As a matter of logical necessity, the expert's opinion is based upon conjecture and speculation and cannot be deemed to preponderate in favor of defendant's hypothesized theory of arson (*Rinaldi & Sons v. Wells Fargo Alarm Serv.*, 39 NY 2d 191, 196; *Carrera v. State of New York*, 29 AD 2d 577, 578), particularly in the absence of proof of motive (cf. *Anderson v. General Acc. Fire & Life Assur. Corp.*, 58 AD 2d 568; *V.F.V. Constr. Co. v. Aetna Ins. Co.*, 56 AD 2d 598). Accordingly, the jury's verdict should have been set aside as against the weight of the evidence (see *O'Boyle v. Avis Rent-A-Car System*, 78 AD 2d 431, 439).

For these reasons, the judgment appealed from should be reversed, on the law and the facts, and a new trial granted.

All concur.

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(4) Trial Term did not give such an instruction. On re-trial, it should do so.